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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ADAM DAVID IVY, Defendant and Appellant.	B206160 (Los Angeles County Super. Ct. No. BA303315)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Adam David Ivy was convicted by a jury of first degree murder with true findings that he committed the murder for the benefit of a gang and used and discharged a firearm, causing great bodily injury and death. On appeal, Ivy contends: (1) the denial of his motion for self-representation was reversible error, (2) the trial court erroneously limited his expert's testimony, (3) the evidence was insufficient to support his conviction, and (4) the aiding and abetting instruction given to the jury was ambiguous. We affirm.

FACTS

On August 9, 2002, Steven Leon Green, Jr., was getting his car washed at 54th Street and Third Avenue in Los Angeles at approximately 3:20 in the afternoon when two men approached the car wash. One man asked Green, "What's up?" When Green did not answer, the first man shot at him five or six times with a semi-automatic gun while the second man shot a few rounds into the air with a revolver. The shooter then ran northbound on Third Avenue and his accomplice ran southbound on Third Avenue. Green died at the scene. Ivy and Michael Greenfield were charged with one count of murder and one count of attempted, premeditated murder.[1] Ivy was prosecuted on an aiding and abetting theory; Greenfield was prosecuted as the shooter.[2]

I. Prosecution Witnesses

Several car wash employees testified for the prosecution.

Carlos Rivas, a supervisor, briefly saw the shooter's profile and the accomplice's face. He described the shooter as a heavyset Black man and his accomplice was a thinner Black man. At a photographic lineup in September 2002, Rivas identified Greenfield as the shooter, but he could not identify the accomplice. Four years later, Rivas told the police he recalled the accomplice being about 17 years old.

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[1] The second count related to the attempted murder of Carlos Molina, who was shot in the ankle by a stray bullet. The jury acquitted Ivy on this charge and it is not a subject of this appeal.

[2] Greenfield is not a party to this appeal.

Derik Reyes also briefly saw the shooter and the accomplice. In May 2006, Reyes described the shooter as a heavyset Black man, who was about 5'7" and 220 pounds. Reyes described the accomplice as a skinny Black male. Neither Reyes nor any of the other car wash employees working that day were able to identify Ivy from a photographic or live lineup.

Five other witnesses heard the shots and saw a Black man moving quickly southbound down Third Avenue with what appeared to be a gun. Duane Shepard looked out his window when he heard the gunshots and saw a Black man walking away from the car wash. Shepard, a youth counselor, followed the man in his car because he believed it was a young man from the neighborhood whom he had been monitoring. He wanted to make sure the youth was not involved in the shooting. When the person turned out not to be who Shepard thought he was, Shepard gave him a ride around the corner. Later, Shepard took a group photograph of people in the neighborhood. He realized in 2006 that the person to whom he gave a ride was in the photograph. Shepard identified Ivy in a photographic lineup on May 8, 2006, and at trial.

Michael Moore, who was at his home on Third Avenue, saw a Black man walking quickly down the street with a pistol, wearing a white T-shirt and basketball shorts. Moore told the police a few days before trial (after he moved from the area) that he recognized Ivy immediately when he viewed a photographic lineup in 2006, but he initially did not want to get involved because he feared for his family's safety. Moore identified Ivy at trial.

Marleesha Davis and Hollea Davis were in front of their home on Third Avenue, one block from the car wash, at the time of the shooting. Marleesha testified she saw a Black man with short hair, dark skin and a gun, but could not identify him in a lineup. Hollea identified Ivy in a photographic lineup in 2006 and at trial. Hollea told the police she recognized the man walking away from the car wash on the day of the shooting because she went to school with him in the fifth grade. Ronald Winer, an entertainer working at the Davis' house that day, said he believed the man had a gun under his shirt.

When Winer, who had been taking pictures of the party at the Davis' house, attempted to take the man's picture, he flashed his gun at him.

II. Defense Witnesses

Ivy presented testimony from Mitchell Eisen, Ph.D., as an expert in memory. Eisen testified how memory can be affected by time, bias, other people, and by whether it was a significant event in the person's life. He also testified to studies which addressed the ways to construct photographic lineups, including one done by the Department of Justice. Greenfield presented expert testimony on eyewitness psychology.

III. Verdict and Sentence

The jury found Ivy guilty of first degree murder and found true the allegations that an accomplice personally discharged a firearm, causing great bodily injury and death, and the offense was committed for the benefit of a criminal street gang. (Pen. Code, §§ 186.22, subd. (b)(1), 187, subd. (a), 12022.53, subds. (b), (e).) Ivy was sentenced to state prison for an aggregate term of 50 years to life, consisting of a 25-year-to-life term for the murder and an additional 25 years to life for the firearm enhancement. The gang enhancement was stricken, and the remaining firearm allegations were stayed.

Ivy filed a timely notice of appeal.

DISCUSSION

I. Motion for Self-representation

Ivy made two motions to be relieved of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). When his second *Marsden* motion was denied 18 days before trial, Ivy asked to represent himself. The following colloquy took place between Ivy and the trial court:

"DEFENDANT IVY: I would like to go pro per.

> "THE COURT: Now, Mr. Ivy, you know, if you want to go pro per under the law you can go pro per. But there are a lot of things I have to tell you. But let me tell you this. [¶] I am not going to delay the trial, sir. And we're going to trial on December third. [¶] Now, if you want to represent yourself, you can certainly do so. We judges have to tell you that that is a very bad idea. [¶] I have been trying cases for a long time. I have had some pro per defendants. I have never had a pro per defendant win a case.

> They often alienate the jury to the point where they've made their case much worse for themselves than if they had stayed with counsel. [¶] But I am not going to delay the trial.
>
> "DEFENDANT IVY: So --
>
> "THE COURT: I won't treat you any differently.
>
> "DEFENDANT IVY: So basically you're telling me that if I go pro per, then basically I have to go to trial December third in my pro per status?
>
> "THE COURT: You are going to trial on December third whether you are pro per or whether you are represented by counsel. That is what I am telling you.
>
> "DEFENDANT IVY: Bullshit.
>
> "THE COURT: I am sorry, I think you mumbled something, but I didn't hear what it was.
>
> "DEFENDANT IVY: That's not enough time for me to get ready for trial.
>
> "THE COURT: All right, well. You better stick with Miss Butko."

Ivy contends this discourse demonstrates the trial court erroneously denied his timely motion to proceed in propria persona. We disagree.

A criminal defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so. (*Faretta v. California* (1975) 422 U.S. 806, 836 (*Faretta*); *People v. Windham* (1977) 19 Cal.3d 121, 124 (*Windham*).) In order to invoke an unconditional right of self-representation, however, the defendant must assert the right unequivocally and "within a reasonable time prior to the commencement of trial." (*Windham*, *supra*, 19 Cal.3d at p. 128.) We do not decide whether Ivy made his *Faretta* request within a "reasonable time" because we conclude the request was not unequivocal.

"Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of

justice may be denied." (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) We review the entire record to determine de novo whether Ivy's request was unequivocal. (*Ibid.*; *People v. Danks* (2004) 32 Cal.4th 269, 295.)

In *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205-1206 (*Scott*), our colleagues in Division Three concluded the trial court did not err in denying a defendant's motion for self-representation because it was untimely and more importantly, "not unequivocal. Scott made his *Faretta* motion *immediately after* the trial court denied his *Marsden* motion, and Scott's subsequent comments suggest he made the *Faretta* motion only because he wanted to rid himself of appointed counsel." (*Id.* at p. 1205, fn. omitted.) The defendant in *Scott* also could not represent to the court that he could try the case without a continuance. (*Id.* at p. 1205.)

As in *Scott*, a reasonable inference to be drawn from the circumstances surrounding Ivy's request is that his *Faretta* motion was made from frustration over the denial of his *Marsden* motion rather than from any real desire to represent himself. Ivy's request, like the one in *Scott*, was made immediately after his second *Marsden* motion was denied. Ivy also admitted he could not try the case without additional time. Moreover, he quickly acquiesced in keeping his counsel when the trial court suggested he would be better off with counsel than representing himself. Given the directive to draw every reasonable inference *against* the waiver of the right to counsel, we find the trial court did not err in denying Ivy's motion to represent himself.

Ivy argues the trial court should have granted him a continuance in order to allow him to represent himself. We find no error. It is only after a *Faretta* motion has been granted that the trial court is obligated to ensure a defendant representing himself has sufficient time to prepare for trial. (*People v. Bigelow* (1984) 37 Cal.3d 731, 741, fn. 3; *People v. Maddox* (1967) 67 Cal.2d 647, 653.) None of the cases cited by Ivy stand for the proposition that a defendant is entitled to a continuance so that his equivocal *Faretta* motion, even if timely, can be granted. (*Windham*, *supra*, 19 Cal.3d at p. 128; *People v. Herrera* (1980) 104 Cal.App.3d 167, 175; *People v. Tyner* (1977) 76 Cal.App.3d 352, 355.)

II. Limitation on Expert Testimony

At trial, Ivy presented expert testimony from a forensic psychologist specializing in human memory of events and suggestibility. The trial court sustained its own objections under Evidence Code section 352 during direct examination to questions relating to (1) the expert's knowledge of the California Commission on the Fair Administration of Justice's recommendations on administering lineups and (2) the expert's knowledge of case studies showing false identification in actual criminal cases. Ivy argues the trial court's preclusion of such testimony "eviscerated" his chosen mistaken identity defense.

A trial court may properly exclude evidence on its own motion where counsel does not object or makes an insufficient objection. (*People v. White* (1954) 43 Cal.2d 740, 747.) A trial court has broad discretion to exclude evidence it deems irrelevant, cumulative, or unduly prejudicial or time-consuming. (Evid. Code, § 352.) We overturn a ruling excluding evidence under Evidence Code section 352 only if the trial court " 'exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1310.) We find no such miscarriage of justice here.

Eisen testified there were "many, many hundreds" of studies in examining ways to construct lineups. He described at length the guidelines set up by the Department of Justice that represented the analysis of numerous studies done on this topic and the expertise of prosecutors, law enforcement, defense attorneys, and scientists. When the trial court sustained its own objection to further testimony regarding the California Commission on the Fair Administration of Justice's recommendations on lineups, one reasonable inference is that the court implicitly exercised its discretion and concluded the questioning was cumulative and unduly time-consuming. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

We also find no abuse of discretion when trial court barred testimony on specific false identification cases, ruling: "I am not going to let you talk about false identification cases just like I wouldn't let you talk about accurate identification cases. [¶] The jury

will judge this case on the evidence here. The witness is here to express what as I thought he said rather well, what some of the research has shown regarding memory and recollection and retention. I am not going to get into specific cases." The trial court allowed lengthy testimony regarding the factors that may affect eyewitness memory and testimony as well as testimony that false identifications happen "all the time;" it could reasonably conclude testimony on specific cases would only serve to confuse the jury. (*People v. London* (1988) 206 Cal.App.3d 896, 909.) The astute trial judge properly limited the scope of this testimony; there simply was no error.

III. Sufficiency of the Evidence

Ivy claims the evidence supporting his conviction is insufficient. More specifically, he claims the evidence fails to show: (1) his presence at the shooting; (2) he aided and abetted the murder; and that (3) he had the intent required for the gang enhancement. We find sufficient evidence of each category.

First, we briefly review the well-known principles underlying our review for substantial evidence: we view the evidence in a light most favorable to the judgment to determine if there exists substantial evidence from which a rational trier of fact could find each element of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) The testimony of a single witness is sufficient to support a conviction unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Ivy first claims the eyewitness testimony presented by the prosecution at trial was weak. In particular, he attempts to discredit the testimony of Shepard, Hollea, and Moore, who each positively identified him as the man they saw walking away from the car wash shortly after the shooting. According to Ivy, "the circumstances of the observations undermine confidence in the reliability of the identifications" because, among other things, none saw the actual shooting, the identifications did not come until four years after the shooting, and Hollea and Moore had problems with their vision.

The question we must answer, however, is not whether we have "confidence in the reliability of the identifications," but whether our review of the whole record in the light most favorable to the judgment discloses evidence that is reasonable, credible and of solid value to support the jury's finding of guilt beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We find such substantial evidence exists. All three witnesses placed Ivy near the car wash shortly after the shooting. They also testified they saw Ivy carrying a gun at the time. Hollea identified Ivy from a photographic lineup, a school group photograph, and also in court. She recognized him because she knew him from school. Moore identified Ivy in court. He said he did not identify Ivy from the initial photographic lineup with absolute certainty because he feared him. Shepard spent time with Ivy in his car and was able to identify him in court. The law provides that *any one* of these eyewitnesses alone is sufficient; here, they also corroborate one another. Such circumstantial evidence is sufficient to connect Ivy to the crime and prove his guilt beyond a reasonable doubt. (*People v. Bean* (1988) 46 Cal.3d 919, 933.)

Ivy next contends there is insufficient evidence to show he had the requisite intent to aid and abet the shooter because he only arrived with the shooter and shot a few rounds in the air. Contrary to Ivy's assertion, there is sufficient evidence to support the conviction in this regard. An aider and abettor must "act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) The jury could reasonably conclude that when Ivy fired shots into the air he did so to divert attention away from his cohort and thus facilitate the murder. Similar acts have been found sufficient for purposes of aiding and abetting. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5-6; *People v. Campbell* (1994) 25 Cal.App.4th 402, 411.) Likewise, we find the evidence sufficient here.

Finally, Ivy argues there was insufficient evidence to support the gang allegation, i.e., to show that the shooting was committed with the specific intent to promote, further or assist criminal conduct by gang members. Because the gang allegation allowed imposition of the firearm enhancement under a vicarious liability theory (Pen. Code,

§§ 186.22, subd. (b), 12022.53, subd. (e)), Ivy requests the judgment be modified to strike the 25-year-to-life firearm sentencing enhancement. We find the evidence at trial was sufficient to support the jury's finding that Ivy had the specific intent to promote, further or assist criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Ivy and Greenfield were admitted members of the Van Ness Gangsters. Green, the victim, had tattoos on his left arm and was found with $1,200 in cash, rock cocaine, and several small baggies on his person. The prosecution's expert opined that the Van Ness Gangsters could view a person selling narcotics in their territory as provocation to shoot him. This is sufficient evidence.

IV. Instructional Error

The jury was instructed with a modified[3] CALCRIM No. 401 as follows:

> "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he [or she] knows of the perpetrator's unlawful purpose and he [or she] specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that a defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him [or her] an aider and abettor."

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3 The standard instruction was modified to (1) delete the phrases "or she/or her" shown in the bracketed portions, (2) include an optional paragraph regarding presence at the scene of the crime, and (3) exclude an optional paragraph regarding withdrawal.

Ivy contends the term "crime" in the instruction is ambiguous and the trial court erred in failing to define it. According to Ivy, "[t]hat term could mean 'the crime[']actually committed by the perpetrator or it could mean 'the crime' the accomplice had knowledge the principal intended to commit." Even if the term "crime" in the instruction was ambiguous, a finding we do not make,[4] Ivy forfeited his claim of error by failing to request clarification of the instruction at trial. (*People v. Rundle* (2008) 43 Cal.4th 76, 151.)

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.

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[4] Case law provides that the words of an instruction require no clarification when they are of common use and knowledge. (*People v. Hardy* (1992) 2 Cal.4th 86, 153.)